IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FEREYDUN TABAIAN and AHMAD ASHRAFZADEH,	)	
Plaintiffs,	)	No. 3:18-cv-00326-HZ
vs.	)	June 27, 2018
INTEL CORPORATION,	)	Portland, Oregon
Defendant.	)	

TELEPHONIC HEARING

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MARCO A. HERNANDEZ

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR THE PLAINTIFF:

Jeffrey S. Love
Mark W. Wilson
Klarquist Sparkman LLP
121 S. W. Salmon Street
Suite 1600
Portland, OR 97204

Howard L. Close
Kathleen S. Rose
Patrick B. McAndrew
Wright Close & Barger, LLP
One Riverway
Suite 2200
Houston, TX 77057

Luke Motley, IV
Law Offices of Luke Motley, IV PC
111 s. Travis Street
Sherman, TX 75090

FOR THE DEFENDANT:

Renee E. Rothauge
Markowitz Herbold PC
1211 S. W. Fifth Avenue
Suite 3000
Portland, OR 97204-3730

Michael J. Summersgill
Jordan L. Hirsch
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109

ALSO PRESENT:

Mashood Rassam, Intel counsel

COURT REPORTER:

Nancy M. Walker, CSR, RMR, CRR
United States District Courthouse
1000 S. W. Third Avenue, Room 301
Portland, OR 97204
(503) 326-8186

P R O C E E D I N G S

THE CLERK: Good morning. This is the matter of Tabaian, et al. versus Intel Corporation, Case No. 18-cv-326, Judge Hernandez presiding.

This is the time set for a Rule 16 conference. Please note we have a court reporter present, so please identify yourself each time you speak.

Counsel, please tell me who all is on the record, starting with the plaintiff.

MR. CLOSE: Good morning, Your Honor. This is Howard Close with Wright Close & Barger in Houston, Texas.

MR. MOTLEY: This is Luke Motley with Luke Motley, IV PC.

MR. LOVE: Jeff Love with Klarquist Sparkman, and also Mark Wilson with Klarquist Sparkman.

MR. McANDREW: And additionally, Your Honor, Patrick McAndrew and Kathleen Rose with Wright Close & Barger in Houston.

THE CLERK: And for defendant?

MS. ROTHAUGE: Good morning. For Intel, I am Renee Rothauge of Markowitz Herbold. I'm joined by Michael Summersgill of Wilmer Hale, lead trial counsel; Jordan Hirsch of Wilmer Hale; and Mashhood Rassam, Intel.

THE COURT: Good morning.

MR. SUMMERSGILL: Good morning, Your Honor.

THE COURT: Good morning. This is Judge Hernandez.

We're here to try to put together a schedule for you leading up to a *Markman* hearing. I know that you are asking that -- I think -- that we use Western Washington's local rules regarding patent.

Are both sides asking that I do that, turning first to the plaintiff?

MR. CLOSE: Yes, Your Honor. We are.

THE COURT REPORTER: This is the reporter. I'm going to remind you, I don't know who is speaking.

MR. CLOSE: Yes, ma'am. I apologize. This is Howard Close.

Yes, we are, Your Honor.

THE COURT: Thank you.

And is the defense in agreement with that?

MR. SUMMERSGILL: Your Honor, this is Michael Summersgill.

And, no, we are not in agreement on that. Our understanding, based on having been in this jurisdiction before and speaking with Ms. Rothauge, is that typically the Courts apply, you know, a particular course that's appropriate for a given case, and that's one of the reasons why patent local rules have not been adopted. And we think that's particularly appropriate for this case, and that's why we disagree with that.

And I can get into that whenever it's appropriate, Your Honor.

THE COURT: No. That's okay. I like to do whatever I want to do anyway, so don't worry about it.

(Laughter.)

THE COURT: All right. So then let's talk about what we need to accomplish together between now and your *Markman* hearing.

And I want to first turn to the plaintiff. And on my list of things to do are figuring out the infringement and invalidity contentions, disclosing -- disclosure of claims to construe and the terms to construe. My job will be to limit the number of those claims and terms to construe so that you don't drive me crazy by giving me too many.

As I understand it, there's only one patent in issue and one claim in issue. So let's confirm that.

MR. CLOSE: There's one independent claim, Your Honor, and I think there's 18 dependent claims, but there's only one independent claim at issue.

THE COURT: Oh, okay. All right.

And then we need to kind of take into consideration -- I'm not familiar with the technology. It's described to me in a way that makes it so that I generally understand what it does, but I'm sure that at some point it may become more technical than I'm familiar with. And so one

of the things to keep in the back of your minds is if this technology is that, how you're going to educate me in a way that is understandable.

So let's start at the beginning, and I'm turning to the plaintiffs and your list of things that need to be accomplished and the schedule that you think you will need in order to get those things accomplished.

MR. CLOSE: Certainly, Your Honor. This is Howard Close for the plaintiffs.

We've worked with the other side on the various issues in the Rule 26 order. And basically there's a couple of things that we have disagreement on, and those are the things I think we need to get accomplished with the Court today.

One of them is we would like to get discovery so that we could be able to -- so that the Court would know, when it's evaluating the claim terms, basically how this all fits together, whether what we're saying our patent does matches what they say their product does.

We've proposed some discovery. We have a disagreement on the timing of that discovery, but we think we need to get that done.

We have a disagreement on deposition limitations. We had talked about an hour limit. The other side had talked about a specific number of depositions and specifically

limiting us to a specific number of depositions for Intel. We just weren't able to agree on that point.

And then the third thing is a protective order. We're working on a protective order. We had a conference call with defendants today on a proposed way to try to work out a protective order. So we need to work out those issues so that we can get this thing moving forward.

THE COURT: On the discovery part of it, do you have agreement as to the scope of discovery and what it will -- you know, what it's going to include and what it's not going to include?

MR. CLOSE: I don't -- I don't know if we have --

UNIDENTIFIED SPEAKER: We haven't discussed it.

MR. CLOSE: We haven't really discussed scope so much. It's more of the timing, Your Honor, that we've been having a hard time agreeing on. We'd like to have discovery of -- some basic core discovery about the product at issue so that we can make sure, when we're trying to talk to you about what claim terms we need to construe and things like that, we know whether that's important or not, based on the product at issue.

We're not trying to discover all types of outside things. In fact, we're fine with pushing off, you know, discovery on damages and things like that, since we're not worried about those, as opposed to focusing in on whether or

not the product that Intel makes infringes on our patent.

And so that's, I think, the only scope issues that we've really talked about.

THE COURT: And have you figured out -- and maybe you believe that your claim does it sufficiently, but what the specific infringement contentions are?

MR. CLOSE: We're --

UNIDENTIFIED SPEAKER: We're working on that.

MR. CLOSE: We're working on that. But we think that we need -- there are certain -- you know, all we have are what we know about our patent and what we know about the Intel product from publicly available data. But we don't have the specific data that's necessary to make sure that we're accurately describing how the Intel product infringes on our particular patent.

THE COURT: So what you're saying is you need discovery in order to define for the defendant what the specific infringement contentions are.

MR. McANDREW: Yes, Your Honor. This is Patrick McAndrew, also for the plaintiffs.

And what we really would like to do is to be able to have some discovery take place prior to the claim construction that occurs. And this kind of requires us to do some discovery on the accused device so we know what claim terms need resolution and what issues really are valid, mainly so we

don't ask you to construe a term without guidance and, you know, essentially have the Court improperly issue some sort of advisory opinion.

We would like to have the discovery take place early on. And if we can do that, I think, you know, we can move towards a greater understanding by both sides of what issues are valid and whether or not, you know, as the defendants contend, the case can be disposed of on summary judgment. We'd like to know that very quickly.

THE COURT: What kinds of things are you going to be asking for?

MR. McANDREW: Sure. You know, Your Honor, we exchanged, both sides -- I'm sorry. Again, this is Patrick McAndrew.

We exchanged initial discovery and we sent the plaintiffs one -- the defendant one interrogatory that requests them to identify schematics and other design documents that they contend support their non-infringement allegations that are listed in its Answer and Counterclaim and describe how those support the allegations.

We additionally sent a number of requests for production that cover a lot of those issues as well, and Intel has propounded discovery on us as well. Those responses are due on Monday.

And, as Mr. Close said, we had an initial

conversation today with counsel for Intel regarding the protective order and trying to get closer to where we are, where the parties currently are. And we proposed to go back and speak again early next week.

You know, one possibility, Your Honor, could be that we allow the parties to try to work out the protective order and do some discovery and schedule another Rule 16 conference a little bit down the road, that then once we have a better understanding of where we are, we can really lay out the road map to get to the *Markman* hearing.

THE COURT: Okay. Thank you.

Let me hear from the defendants.

MR. SUMMERSGILL: Thank you, Your Honor. This is Michael Summersgill.

A couple of things. Let me start with the last point Your Honor made about at some point giving you a helpful understanding of the technology. I'm sure the parties can work together, as we've done in other cases, to put together a tutorial where we can walk through the technology.

As far as these cases go, the technology in this case is relatively straightforward. It's about a particular type of voltage regulator which, as its name suggests, it's something that regulates voltage and does it in a particular way. But I think we can work with the other side maybe to make proposals on a tutorial ahead of the claim construction.

There is no dispute that we'll be producing discovery, and we're working on that right now. We're working on getting our -- collecting our documents and getting them ready for production. But the suggestion that the plaintiffs need to delay the claim construction process until after they have our documents is just inconsistent with Federal Circuit law.

As Your Honor is aware, the *Phillips* case, the Federal Circuit *Phillips* case, dictates or provides rules for claim construction. And claims are supposed to be construed based on the plain language of the claims, the patent specification, and the file history. The operation of our products is completely irrelevant to the -- to the proper construction of the claims.

Now, Your Honor, the two primary disputes, from our perspective, on the scheduling issues relate to the timing of claim construction and then the timing of the infringement and invalidity contentions. And what we've proposed is -- is a schedule that brings the claim construction process a little bit earlier in the schedule, and it's a schedule that proposes infringement and invalidity contentions that actually have some teeth, that mean something. And we have proposed that because we think this is a case that is susceptible to early resolution. And let me explain why we -- why we think that.

The patent is directed, as I said, to a particular type of voltage regulator. It's a voltage regulator that uses temperature data to make certain adjustments, without getting into the details, but it's using temperature data to adjust what are called feedback loops, both a circuit feedback loop and a voltage droop feedback loop.

Intel simply does not do that. We've spoken to the Intel engineers. Intel doesn't do that. And so we think that once the claims are construed, plaintiffs will not have a basis for asserting infringement. We don't think there is an infringement argument under any plausible construction of the claims.

And so our proposals are designed to get the claims construed as early as possible and to get the parties' positions out in front as early as possible so that we can see what the real disputes are and we can set the case up for possible early resolution.

Now, so our -- on the claim construction issue, we're proposing that the parties propose terms for construction on July 13, propose construction by August 10, and then the completion of claim construction briefing by November 21st.

And we'd submit, Your Honor, that this proposal is more efficient than the plaintiffs' proposed for three reasons. One, it's going to make discovery more efficient. Of course, the issues of infringement and invalidity often

depend in part on claim construction, on the scope of the claims. And if we know what the parties' positions are on claim construction and then have the Court's ruling on claim construction sooner rather than later, we can focus the discovery on the issues that are relevant under that construction.

Second, as I said, we think this case is susceptible to early resolution. And resolving the claim construction early will clarify the scope of the claims and we believe show that they can't make out a case of infringement, so it will set the case up for early summary judgment.

And there's a host of cases out there, some of which we cited in our section of the 26(f) report, which talk about the -- the benefit of doing an earlier claim construction in cases such as this, the *Lexos Media IP* case that we cited, the *MyMedical Records* case that we cited.

And there's an additional case. It's a District of Delaware case from 2016, the *MorphoSys AG v. Janssen Biotech* case. And I think it provides a nice sort of explanation of why this is important. The Court there granted early claim construction where the claim terms at issue were relevant to every claim; and that's, of course, true here because there's only one independent claim. It appeared possible that if the defendant's proposed constructions are adopted, those constructions will ultimately be case dispositive. We believe

that to be true here. And there's not much discovery required for the claim construction process. And, again, we believe that's true here because their claims, under *Phillips*, are supposed to be construed based on the intrinsic evidence, the patent and the file history.

And the third piece I'd say about doing claim construction according to our schedule is that there's no reason that we can't do it. You know, the plaintiff certainly had to have a basis before they filed this case, both an understanding of their own patent and a basic if not more developed understanding of what we do and why they believe we infringe. And they have all of the information they need now to construe the claims of their own patent. As I said, what our products do is irrelevant to the construction of the claims.

So for all of those reasons, we think it makes more sense and would be much more efficient to adopt our claim construction proposal.

THE COURT: Do you anticipate having any experts testifying regarding claim construction, you know, telling me that a person of ordinary skill in the art is going to look at this particular term in a particular way?

MR. SUMMERSGILL: Your Honor, this is Michael Summersgill again.

You know, not necessarily. It's not always the case.

And, as I said, it's the intrinsic evidence that is relevant.

Now, if the plaintiffs were to submit a declaration from an expert taking positions that we think are contrary to what one of ordinary skill in the art would say, in that situation we would certainly want to submit a responsive declaration. But, you know, typically we try to avoid expert declarations for claim construction because, again, it's the intrinsic evidence that's supposed to be relevant.

MR. LOVE: Your Honor, this is Jeff Love.

May I just respond to the issue about the need for discovery before the claim construction process?

THE COURT: Sure.

MR. LOVE: Yes. This is Jeff Love for the plaintiffs.

I'd refer the Court to the lead case on the helpfulness of discovery and evidence about the accused product to the claim construction process, which is *Wilson Sporting Goods v. Hillerich & Bradsby*, 442 F.3d 1322, 1326 and 1327. It's a 2006 Federal Circuit case.

And just what that case states is that knowledge of the "product or process provides meaningful context for the first step of the infringement analysis," which is claim construction. And it's "convenient for the court to concentrate on those aspects of the claim whose relation to the accused device is in dispute."

And I have before me several other cases that have followed that, and we cited that as well, bench Circuit cases.

And, you know, the point is that what the defendants have proposed is going into claim construction blind, without the -- without the Court having the benefit or the plaintiffs having the benefit of knowing what's really in factual dispute. Because the point of claim construction is not an abstract exercise of just looking at the patent and the file history and the intrinsic evidence as what's said. The point is to do that in order to facilitate resolution of disputes relevant to infringement and invalidity.

And that's why to just be forced to choose, for example, claim terms to construe, when the plaintiffs have had not the benefit of looking at the documents that the defendants have in hand -- they just told you they talked to their experts at Intel, or engineers, and their Intel engineers tell them that "We don't infringe for several reasons." And Monday is their deadline for where they should be producing the pertinent information.

You know, and so what we ought to do is make sure that we get that information so that the plaintiffs can understand what's in dispute factually. And then we can tailor the selection of claim terms accordingly so that when the Court goes through the exercise to construe them, it will have a much, much better chance of actually resolving the

disputes.

And with respect to the documents that we need, my understanding is that the defendants are prepared to produce RTL-level source code and then also schematics that will include, you know, a full description of what's at issue in the case, which is this voltage regulator.

We have asked for them, in our interrogatories, to identify the particular pages, essentially, of those two types of documents -- the source code and the schematics -- that are actually pertinent to the non-infringement defenses that they rely on. Until they give us an interrogatory response that does that -- I think we're talking about, you know, a relatively few pages that are going to be answering that question. And, again, they asked for an extension to Monday, but not beyond that. We understand that they should be prepared to produce those on Monday.

We've got to work out the protective order issue. We're agreeable to the Court's standard two-tier protective order, but they want some heightened protection. If they could just produce those documents now, subject to the Court's two-tier protective order, while we're working out other issues, that's the best way to get ready for an early claim construction.

But to set a schedule before we've got the documents or know how long it's going to take us to get those documents

that Intel has in hand and they're already saying, you know, that their engineers have identified what's really at issue, that makes no sense.

MR. SUMMERSGILL: Your Honor, this is Michael Summersgill. May I respond to a couple of those points?

THE COURT: Sure.

MR. SUMMERSGILL: The first thing is we actually aren't the ones that asked for the extension. Plaintiffs asked for a two-week extension, and we agreed with it. So we didn't ask for the extension.

Second, we're familiar with the *Wilson Sporting Goods* case. And I think it's important to note that *Wilson* doesn't say that you look to the defendant's products to determine the proper construction of the claims. It doesn't say that at all. *Phillips* and all of the claim construction cases are -- are construed based on the claims, the specification, and the file history. And, in fact, the *Wilson* case itself says, "This court, of course, repeats its rule that 'claims may not be construed with reference to the accused device.'"

So that's -- so the *Wilson* case doesn't say that discovery regarding a defendant's products are necessary. It says claims are not to be construed with respect to the accused device.

Sometimes understanding what is at dispute can help focus the claim construction dispute and what terms to choose.

But, you know, we've done a little bit of that already with them, both in meet and confers and on this conference. We've said, among other things, we don't use temperature data in the particular way that's required by these claims.

And, you know, so -- and typically plaintiffs don't often propose many terms for construction. So I think this is a little bit of a red herring. We would propose somewhere between five and seven terms for construction. We're prepared to do that immediately. We're prepared to exchange proposed claim constructions according to the schedule and proceed with the claim construction process. And that will, I think, very clearly focus and narrow the issues.

And, you know, if the plaintiffs can now tell you and tell us how they believe we use temperature data as required by the claims, then -- you know, then maybe we don't have as much of a position here. But we know, based on our discussions with our engineers, that we don't do that.

And, finally, Mr. Love's suggestion that we can simply, you know, very quickly go out and collect and produce all of the documents is just not realistic. We're working on that, but there are a lot of different places to look. There's a lot of source code. We've got to get through the source code, find the relevant parts, find the relevant documents. We're working diligently, but it's a massive and expensive process.

And, frankly, that's one of the reasons why we want to have an early claim construction process, to reduce that -- reduce that burden. But the suggestion that we can simply just go over to Intel, get the documents, and produce them right away is just simply not realistic.

THE COURT: Is it the --

MR. LOVE: Your Honor, Jeff Love. May I respond?

THE COURT: No. Hang on a second. It's my turn.

Turning to the defendants, is it the defendant's contention that the only issue right now is that the technology that the plaintiffs are suggesting that the defense used is not technology that the defendants are using? Is that your defense, or are there other things floating around out there that you haven't gotten to yet?

MR. SUMMERSGILL: We -- our position, Your Honor, is we don't use the system that's described in the claims of the '944 patent. We also believe the claims are invalid and that the claim construction, I think, would clarify both of those issues.

THE COURT: And have you described for the plaintiffs specifically how you think their claims are invalid?

MR. SUMMERSGILL: We haven't yet. And the reason we haven't yet is because, again, it's their burden to come forward first with infringement contentions. In fact, we both agreed to that in the schedule; that is, their infringement

contentions should come before our invalidity contentions. But we're certainly prepared to present our invalidity contentions once they've presented their infringement contentions.

And one of the reasons for that, Your Honor, is because sometimes the invalidity argument depends in part on the infringement contention. If they take a very broad view of their patent and say, "It covers A, B, C, D, and E," we may disagree with that, but we then may say, "Okay. Well, A, we just disagree with that. B, our products don't do that. And, C, even if you're right that your patent covers that, then you cover the prior art and the patent is invalid."

So that's why, you know, in these local patent rules and in typical patent cases, when you have contentions, the invalidity contentions follow the infringement contentions.

THE COURT: And what the plaintiff is telling me is that they're not quite ready to tell you specifically what their infringement contentions are because they're not certain what your technology does.

MR. SUMMERSGILL: And, Your Honor -- again, this is Michael Summersgill.

Just to clarify, looking at our whole schedule, the sequence -- the relevant sequence here is the parties propose terms for construction. The parties propose proposed constructions. In late August we produce our technical

production. The claim construction -- I'm sorry. We produce our documents in late August. The parties then engage in claim construction briefing. And then in the fall we have -- we have infringement contentions and invalidity contentions.

So they would have our technical production before claim construction briefing is submitted. So they'd have that if they need it. As I said, I don't think they should need it, but they would have it. And they would have our technical production before they're required to submit their infringement contentions.

THE COURT: And I'm sorry. I'm looking at your schedule, and you're saying that all of that information is going to be disclosed when?

MR. SUMMERSGILL: All -- so, Your Honor, just in terms of the relevant claim construction and contention dates, we would -- according to our schedule, disclosure of asserted claims would come -- we had June 22. That would obviously have to be pushed back. We propose July 13. Parties would propose terms for construction on July 13. Parties would propose actual constructions August 10. We would then complete our technical production, sufficient to show how our products operate, by August 31st.

Plaintiffs would submit their infringement contentions on October 26th. We would submit our invalidity

contentions on December 21. And, actually, claim construction briefing would be completed by November 21.

So the parties -- so at a high level, the parties propose the terms and -- the terms proposed for construction first. We then complete our technical document production. They -- they give us their infringement contentions. We engage in the claim construction process, and we give them our invalidity contentions.

THE COURT: All right. Thank you.

I know the plaintiffs wanted to respond. Go ahead.

MR. LOVE: Thank you, Your Honor. This is Jeff Love.

With respect to *Wilson Sporting Goods*, again, the point the Court emphasized -- so, for example, the holding by that Court is that "despite entry of a final judgment, neither the trial court nor the parties supplied this court with any information about the accused products. Thus, this record affords this court no opportunity to compare the accused products to the asserted claims." And "this sparse record lacks the complete context for accurate claim construction."

So, I mean, two things are being conflated by the defendant. One of them is whether information about the accused products is going to determine the substance of the construction the Court makes. And the point that *Wilson Sporting Goods* and other cases point out is, no, that's going to be based on the patent. But the substance of the accused

product is going to inform the Court and the parties what's at issue.

So, for example, if they say, "Well, we don't use temperature the way claimed in the patent," and then it turns out they measure in Centigrade and they want to argue that the patent is limited to Fahrenheit, you know, we need to know in advance what the issue is going to be, whether Centigrade and Fahrenheit matter. And that's true with every aspect of claim construction, so that we're -- so that we have an opportunity to ask the Court for constructions that matter.

You know, the other thing is they're proposing, you know, essentially hiding the ball on their non-infringement theory for months. They say they know what the non-infringement theory is. They say they've talked to their engineers and they're fully informed on that.

We've got an interrogatory response due Monday. At a minimum, even if they can't find all the documents supporting that theory, they can produce an interrogatory response that lets us know, you know, for example, "Well, we have a temperature sensor, but it doesn't do exactly what we think the claim requires because it does A, B, and C." They can just spell that out to us and they can produce what documents they do have in hand.

THE COURT: Thank you.

I'm not ready right now to set forth what the

appropriate schedule is going to be in this case. I want to get back together with you all in about 10 days. I'm going to look at my calendar really quickly. I'm going to tell you what day and time that's going to be.

In the meantime, I will read -- I'll take a look at *Wilson*. I haven't read that, at least not recently. So I'll take a look at that case. And then I'll be ready to set forth a schedule the next time we visit with each other. I think I understand the parameters of each side's argument.

So hang on just a moment.

(There is a brief pause in the proceedings.)

THE CLERK: 2:00 on July 9th.

THE COURT: July 9th at 2:00. Does that work for plaintiff?

Well, it must. You have a lot of lawyers there. Certainly somebody can be there by that date.

MR. CLOSE: Yes, Your Honor. We'll make sure that works for us. This is Howard Close.

What time, Your Honor?

THE COURT: 2:00.

MR. CLOSE: Okay.

THE COURT: How about for defense?

MR. SUMMERSGILL: Your Honor, this is Michael Summersgill. We're just pulling up -- you said July 9 at 2:00 p.m. Pacific?

THE COURT: Yeah, sorry about that. Yeah, Pacific.

MR. SUMMERSGILL: Yes, we can do that. Yes, that works for us.

I'd just note for Mr. Rassam, who is on the line, that we may have to adjust something, but I think -- I think we can make that work.

THE COURT: We're not really talking about merits. We're talking about scheduling right now.

MR. SUMMERSGILL: Okay. Thank you, Your Honor.

THE COURT: All right.

MR. SUMMERSGILL: Your Honor, I didn't know if you were planning on -- if we're ending it now, if there are other issues. I think it might be productive to talk about the infringement and validity contentions issue as well, just to lay the groundwork for our next discussion, but if you'd prefer to wait, obviously we can wait.

THE COURT: Well, if you have something on your mind, now is a good time to let me now.

MR. SUMMERSGILL: All right. Thank you, Your Honor. Again, this is Michael Summersgill.

So the parties have set forth different proposals on the timing and schedule of infringement and invalidity contentions. But the primary dispute there is it really gets at how meaningful contentions will be. And it's our view that the parties should be required to state the real positions in

their contentions and not simply an initial theory that continues to evolve throughout the case.

And so, for instance, I have said, you know, we don't use temperature data in the manner required by the claims. We'd like to see the plaintiffs' position as to why they think we do. And Mr. Love, in a number of instances, has referred to our need to come forward with our non-infringement defenses. I think he's got it backwards. They have the burden on infringement and the burden of showing how we meet these claims.

And the dispute really is over whether when a party makes contentions, whether those contentions are final or whether you really can have an opportunity to amend repeatedly as the case goes forward.

We have proposed a schedule where they have infringement contentions on October 26th, final invalidity contentions on December 26th. And then there can be amendments to those contentions, but only based on information that was not available at the time the contentions were submitted.

And I think that that approach is -- would be more productive and more efficient for a couple of reasons. One, it has the parties preparing -- it is tied into the claim construction discussion we just had. It has the parties preparing contentions after knowing what the other side's

proposed constructions are. Because infringement and validity turn in part on claim construction, it makes sense to know what the parties' proposed constructions are before you do contentions. Otherwise, once you know a party's construction, you have to narrowly redo the contentions. And it gives both parties -- and we're not looking for this -- but it gives both parties the opportunity to just completely change their theory under the guise of "Oh, well, we now know what the other side's constructions or proposed constructions are."

Second, requiring that these be real positions, where you can only amend them based on new information, prevents what we refer to as the "shifting sands" approach to litigation. You know, by allowing one set of contentions now and then amendments after claim construction, even where parties had proposed those claim constructions that were adopted, and then not put putting any limitations on further amendments just invites the parties to continually evolve their theories.

And Courts have repeatedly said that it's important to avoid that. And there are a number that we cited in the 26(f) report, the *Richtek* case and the *Berger* case. But I'd add the Federal Circuit's *O2 Micro* case, 467 F.3d 1355, 1356. Basically what the Court said -- what the Federal Circuit said in *O2 Micro* is that contentions are meaningless unless parties are required to state their positions and stick to those

positions until and if they discover new information.

Plaintiffs here are trying to preserve the ability to amend their contentions even based on information that was already available to it and -- that was already available to them. And that will just allow them to do exactly what the Courts have said, which is engage in the "shifting sands" approach to litigation. And so that -- that's what we'd like to prevent.

And the third piece is, again, that our schedule would have them receiving our technical production two months before they would have to submit their infringement contentions. And, of course, they have to have some basis for bringing the suit in the first place, so there's plenty of time and plenty of opportunity for them to prepare their infringement contentions under our schedule.

THE COURT: Do the plaintiffs want to respond?

Don't feel compelled, by the way, to respond. But if you want to, you're certainly welcome to.

MR. CLOSE: Your Honor, this is Howard Close. I don't have too much to respond. I just would note from a Texas standpoint, I wouldn't want to play Texas hold 'em with these fellows. They like to keep their cards in -- but on the point about good cause, I think the issue that they propose, one of the disagreements we have on that, in terms of amending our contentions, would obviously be that, you know, the Court

is familiar with and has regularly had to deal with whether someone can amend things based on good cause. They propose a definition of good cause, which I would prefer to just let the Court make a determination of good cause if we amend contentions.

I think we've set out the reasons why we think our schedule works better than theirs, but if you want us to give you any briefing, like we described, we'll be happy to do that before we discuss this with you next, Your Honor.

THE COURT: Thank you.

I have used a good cause analysis previously in other cases to determine whether or not someone should be allowed to change their infringement contentions or not, and I doubt that I'm going to approach it any differently now.

With that, I look forward to speaking with all of you in about 10 days.

Is there anything else from the plaintiffs' perspective we need to talk about now?

MR. CLOSE: Nothing from the plaintiffs, Your Honor. This is Howard Close.

THE COURT: Thank you.

Anything else from the defense perspective that we need to talk about now?

MR. SUMMERSGILL: Not at this time, Your Honor. Thank you.

THE COURT: All right. Thank you, all. See you in about 10 days.

MR. SUMMERSGILL: Thank you.

MR. CLOSE: Thank you.

(Proceedings concluded.)

--oOo--

I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-titled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

/s/ Nancy M. Walker *7-2-18*

NANCY M. WALKER, CSR, RMR, CRR
Official Court Reporter
Oregon CSR No. 90-0091

DATE

D

E